STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL MARTIN,

Plaintiff-Appellee,

v

MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC.,

Defendants-Appellants.

SC No. 154360
COA No. 328240
LC No. 13-000485-NO
(Kalamazoo Circuit Court)

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants Milham Meadows I Limited Partnership and Medallion Management, Inc. ("Defendants") refer this Court to the corresponding subsection found at page v of their Application for Leave to Appeal. It is Defendants' collective view that Medallion Management, Inc. should not be a party to this case because it did not execute a lease with Plaintiff-Appellee Michael Martin, thus falling outside of MCL 554.139(1). See Application, pp 21-22.

STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND INDICATING THE RELIEF SOUGHT

Defendants refer this Court to the corresponding subsection found at pages vi-viii of their Application for Leave to Appeal.

STATEMENT OF THE QUESTION PRESENTED

Defendants refer this Court to the corresponding subsection found at page ix of their Application for Leave to Appeal.

STATEMENT OF FACTS

Defendants refer this Court to the corresponding subsection found at pages 1-15 of their Application for Leave to Appeal.

STANDARD OF REVIEW AND SUPPORTING AUTHORITY

Defendants refer this Court to the corresponding subsection found under the Argument section at page 18 of their Application for Leave to Appeal.

THE NEED FOR SUPREME COURT REVIEW

Defendants refer this Court to the corresponding subsection found at pages 16-17 of their Application for Leave to Appeal.

ARGUMENT I

THERE ARE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY DISPOSITION ON PLAINTIFF-APPELLEE'S CLAIM THAT THE STAIRS AT ISSUE WERE NOT "FIT FOR THE USE INTENDED BY THE PARTIES," FOUND IN MCL 554.139(1)(A).

This Court's May 19, 2017 Order directed the parties to address whether there exist genuine issues of material fact which preclude summary disposition on Plaintiff's contention that the stairs at issue were not "fit for the use intended by the parties" and whether Defendants failed to keep the stairs in "reasonable repair" under MCL 554.139(1)(a) and (b) respectively (the latter subsection addressed in Argument II). MCR 2.116(I)(1) provides that the court shall render judgment without delay if the pleadings, affidavits or other proofs show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See also *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446; 297 NW2d 28 (1998). Here, the crucial question for the Court is whether there is a "genuine issue" of a "material fact" that prevented the grant of summary disposition in favor of Defendants. For an issue of fact to be "genuine," it must first be relevant, defined as having a legitimate tendency to establish or disprove a matter of consequence in the determination of the action. See MRE 401; *Stroh v Hinchman*, 37 Mich 490, 497 (1877); *Dacon v Transue*, 441 Mich 315; 490 NW2d 369 (1992). For an issue of fact to be "material," it must affect the outcome of the action under the governing law. *Anderson v Liberty Lobby*,

Inc, 477 US 242, 248 (1986).[1] Accordingly, to determine whether summary disposition is appropriate, a court must determine the materiality and the genuineness of the facts and issues under the governing law.

This Court has once analyzed the meaning of the phrase "fit for the use intended by the parties" found in MCL 554.139(1)(a) (hereinafter subsection (a)). In *Allison v AEW Capital Management, LLP*, 481 Mich 419, 428-431; 751 NW2d 8 (2008), the Court explained the analytical framework to be used in these types of cases. Subsection (a) does not require any level of fitness beyond what is necessary to allow tenants to use the premises as the parties intended. 481 Mich at 431. As the *Allison* court reasoned in the context of a snowy parking lot:

> The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes.

Id. at 430. In so ruling, the *Allison* Court made clear that the subsection (a) covenant is to be analyzed on whether the premises are fit for their *primary use*, not all conceivable uses. *Id.* at 429-430.

This distinction between primary and secondary uses was applied by the Court of Appeals in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124,

[1] Guidelines for the interpretation of the Michigan Court Rules may be obtained by looking to federal cases interpreting analogous Federal Rules of Civil Procedure. *Durant v Stahlin*, 375 Mich 628, 645; 135 NW2d 392 (1965). MCR 2.116(C)(10) and Fed R Civ P 56 are substantially congruent.

132; 782 NW2d 800 (2010), and applied in the context of outdoor stairs leading to different levels of an apartment complex. The *Hadden* court noted that:

> [T]he primary purpose of a stairwell is to provide pedestrians reasonable access to the different levels of a building or structure.

Hadden, 287 Mich App at 132.[2] The *Hadden* court found a genuine issue of material fact given the nature of the hazard (black ice), garnering a dissent from Court of Appeals Judge Meter:

> Similarly, plaintiff in this case did not show that the condition of the stairway precluded her ability to use the stairway to access different levels of the building. Unlike the plaintiff in *Allison*, who fell on his first encounter with the parking lot, plaintiff in this case had already successfully negotiated the steps, not just one time but *three* times, having encountered the same icy condition the previous day. The stairway was not rendered unfit for its purpose simply because of the presence of some amount of ice that required a careful navigation of the steps.

Hadden, 287 Mich App at 135 (Meter, J., dissenting) (italics original).

Here, the Court of Appeals' finding of a genuine issue of material fact does not survive the *Allison* analytical framework required to decide the existence of a question of fact under subsection (a). The Court of Appeals took refuge in the findings of Plaintiff's expert Patrick Glon that steps are more slippery when painted than when wood is left bare, and an anti-skid adhesive tape, termed "a very simple and inexpensive remedy," together with a pre-shaped metal or rubber strip on the corner of the nosing of the tread, would

[2] In *Hadden*, a panel of the Court of Appeals determined that reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway posed a hidden danger that denied tenants "reasonable access to different levels of the apartment building" and thus rendered the stairway "unfit for its intended use." *Id.* at 132. Upon application to this Court, leave was denied with three justices dissenting (Markman, Corrigan, and Young, JJ.). 488 Mich 945 (2010).

reduce the dangers of the painted stairwell. Court of Appeals Slip Op, p 9. The Court of Appeals reasoned that "[t]his evidence suffices to create a genuine issue of material fact regarding Martin's claim that the stairs were not fit for their use intended by the parties." *Id.* "Reasonable minds could differ regarding whether Martin's basement stairway was appropriate for everyday use given its inherent slipperiness as described in Glon's report." *Id.* at 10. The court found that Glon's report evidenced that each time Plaintiff experienced the stairs, he risked the fall, "[d]espite that Martin used the stairwell regularly." The court concluded:

> "But standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use."

Id. at 10.

The Court of Appeals erred by defining materiality outside the *Allison* analytical framework governing subsection (a). Specifically, the Court of Appeals analyzed subsection (a) in the context of the "unreasonably dangerous" inquiry related to a common-law premises liability claim. See e.g. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 391; 740 NW2d 547 (2007). The uncontroverted evidence was that Mr. Martin encountered the alleged dangerous step twice a day, six days a week, for over three years of his tenancy. This equates with well over 900 encounters where he was able without incident to accomplish the primary purpose or the intended use of a stairwell: access to different levels of a building or structure. As reasoned by the *Hadden* majority, "MCL 554.139(1)(a) does not require perfect maintenance of a stairwell. The stairwell need not be in an ideal condition or in the most accessible possible

condition, but rather must provide tenants "reasonable access" to different building levels. *Id.*, citing *Allison*, 481 Mich at 430. From there, the judges in *Hadden* split on whether there was genuine issue of material fact, Judges Murphy and Beckering found that Plaintiff's ability to use the stairs without incident was insufficient to eliminate a question of fact. As explained earlier, Judge Meter found that the plaintiff's use of the stairwell *three* times evidenced that the stairs were fit for their intended use by her ability to go to different levels of the structure.

In the instant case, Plaintiff used the subject stairs hundreds of times, rather than three times, without incident. Whereas there is arguably a debate about whether three incident-free encounters of a stairwell negate a question of fact on whether the stairwell was fit for its intended use, the same cannot be said for hundreds of incident-free encounters of the stairwell. The Court of Appeals panel did not account for the number of times that Mr. Martin had encountered the alleged hazard without incident, especially when compared to the three incident-free encounters in *Hadden*.[3]

Testimony from an expert that *additional* measures could have been taken to make the steps safer is immaterial under the *Allison* analytical framework, and thus does not create a genuine issue of material fact. As reasoned in *Hadden*, the stairwell need not be in ideal condition or even in the most

[3] It is curious that the Court of Appeals failed to draw a distinction between three incident-free encounters in *Hadden* and hundreds—if not thousands—of incident-free encounters by Mr. Martin, especially when Judge Beckering was on the Court of Appeals panels in each case.

accessible condition possible, but simply must provide tenants with "reasonable access" to different building levels. This was the case, as demonstrated by countless incident-free encounters with the steps by Mr. Martin.

Where the moving party has carried its burden under Rule 2.116(C)(10), its opponent must do more than simply show "there is some metaphysical doubt as to the material facts." *Scott v Harris*, 550 US 372, 380-381 (2007). The principles borrowed from federal case law, reflected in this Court's reasoning in *Maiden* and *Smith*, *supra*, govern:

> "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Anderson v Liberty Lobby, Inc, 477 US 242, 247-248 (1986).

ARGUMENT II

THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY DISPOSITION ON PLAINTIFF-APPELLEE'S CLAIM THAT THE DEFENDANTS-APPELLANTS DID NOT KEEP THE STAIRS AT ISSUE IN "REASONABLE REPAIR," UNDER MCL 554.139(1)(a) AND (b).

There are two reasons why the Michigan Court of Appeals erred when reversing the trial court's grant of summary disposition on the claim that Defendants failed to keep the stairs in "reasonable repair" under MCL 554.139(1)(b) (hereafter subsection (b): (1) the repair suggested by Plaintiff was neither a repair nor reasonable, each required under subsection (b); and (2) there was no notice to Defendants of the precise item that needed to be repaired, namely the top stair which was allegedly slippery.

At page 10 of its Slip Opinion, the Court of Appeals found a question of material fact existed regarding whether Defendants failed to keep the premises in reasonable repair after Plaintiff "provided notice of the steps' slippery condition." The repair sought to be imposed for the alleged slippery condition arises from expert Glon's report, quoted at page 9 of the Slip Opinion. After inspecting the stairwell 4½ years after the incident, Mr. Glon opines that steps are more slippery when painted than when the wood is left bare, that the paint on the staircase of the rental townhouse did not contain any "slip-resistant" additives, and that the addition of an anti-skid adhesive tape would have been a

simple and inexpensive remedy.[4] Notably, there is no record evidence that such measures—slip resistant additive paint or an anti-skid adhesive tape—were used in the original state of the steps. In turn, there is no viable argument that the addition of these measures constitutes a "repair" within the meaning of the phrase "reasonable repair." This is true for two reasons. First, "repair" means to restore by replacing a part or putting together what is torn or broken. Webster's Ninth New Collegiate Dictionary, page 998 (1993). Adding features to the step, not originally found when Plaintiff moved into the townhouse, does not constitute "repair."

Second, subsection (b) only requires a "reasonable" repair. As explained previously in Argument I, MCL 554.139 does not require perfect maintenance, but only requires reasonable maintenance. See e.g. *Hadden*, 287 Mich App at 130.[5] Rather than properly defining the scope of the "reasonable repair" covenant, derived from *Allison* and *Hadden*, the Court of Appeals here went beyond the statutory language and essentially applied a tort standard. Under tort law, a landlord owes a duty to an invitee[6] to exercise reasonable care to

[4] Mr. Glon talked of other measures which could have been taken for the step, including a pre-shaped metal or rubber strip on the corner of the nosing of the tread, but this measure related to the alleged danger in the geometry of the stairwell, which is outside of the "reasonable repair" relating to slipperiness proffered by Plaintiff.

[5] The *Hadden* court was specifically speaking of subsection (a) when making this observation. Defendants suggest that subsections (a) and (b) of the statute should be read in pari delicto and that the scope of covenant for each subsection of the statute should be congruous.

[6] Under tort law, tenants under a lease qualify as invitees. *Stanley v Town Square Co-op*, 203 Mich App 143, 147; 512 NW2d 51 (1993).

protect the invitee of unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Protecting from such a risk of harm does not equate with the limited scope of ensuring that the premises are in reasonable repair. Repair is to restore, under the analysis previously provided. It is separate and distinct from determining whether there is an unreasonable risk of harm from the condition—repaired or not—from which the landlord owes a duty of care to an invitee under tort law.

The second major flaw in the Court of Appeals' finding of a question of fact is the assumption that notice of an alleged slippery stairwell in general constitutes notice of the claimed condition to be reasonably repaired, namely the top step. Pursuant to the instructions of the Court, the notice argument provided by Defendants will not be repeated (found in the Application for Leave to Appeal and supporting Reply Brief, pp 28-33 and pp 4-5, respectively). Instead, Defendants provide several observations drawn from those arguments on why no genuine issue of material fact exists. First, there was never any notice given with respect to the condition of the top stair, such that it would have triggered the covenant for reasonable repair under subsection (b). The Michigan Court of Appeals only inferred such notice from the memorandum of September 14, 2009, which provides:

> "I wanted to let you know that I slipped on the last couple of stairs in the basement.
>
> I didn't get hurt but they are slippery. Can you put down some strips or something on the steps?"

(**Exhibit L** to Defendants' Application). Although only the two bottom steps were referenced, the Court of Appeals machinated the notice to apply to all the steps, including the top step, by reference to the word "they" in the phrase "they are slippery." This is an unreasonable reading of the September 14, 2009 memo. Clearly the word "they" refers to what was referenced immediately before that: the last "couple of steps in the basement." A genuine issue of material fact does not arise from the Court of Appeals' improper and unreasonable interpretation of the September 14, 2009 memo. This is determinative because the Court of Appeals' finding of a question of fact is specifically dependent upon providing notice "of the steps' [plural] slippery condition," Slip Opinion, p 10. Absent notice that the top step, allegedly causing the accident, was in need of repair or even slippery, there is no question of fact. Mr. Martin clearly testified that he slipped on the first step. Plaintiff's Deposition, p 47-48.

The lack of notice of the specific condition which allegedly requires reasonable repair is fatal to Plaintiff's position. Where a lease imposes upon a landlord a general duty to make repairs but does not impose upon the landlord the duty to inspect the premises to determine whether repairs are needed, the duty to make repairs arises only when the landlord has notice that repairs ought to be made. There can be no breach of duty or covenant and no liability in the absence of such notice. See generally *Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with the*

latter, 163 ALR 300 (originally published in 1946); *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978).[7]

RELIEF

WHEREFORE, Defendants-Appellants Milham Meadows I Limited Partnership and Medallion Management, Inc. request this Court peremptorily reverse those portions of the Michigan Court of Appeals opinion which reversed the trial court's grant of summary disposition. In the alternative, Defendants request this Court grant leave to appeal and issue the same result. Defendants also request the recovery of all costs and attorney fees so wrongfully sustained in pursuing this matter in the Michigan Supreme Court.

Respectfully submitted,

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Dated: June 30, 2017

[7] The top step of the stairwell, as well as the stairwell in general, was part of Mr. Martin's townhouse, segregated to that townhouse. It did not constitute a "common area" by which arguably constructive notice could be sufficient.

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PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Monique M. Vanderhoff, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on June 30, 2017, she caused to be served a copy of the Supplemental Brief of Defendants-Appellants, and Proof of Service as follows:

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